INDEX

CITATIONS

628468—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 520

FRED G. DRUMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. Its findings of fact, conclusions of law, and judgment appear in the record at pages 52–57. The opinion of the Circuit Court of Appeals (R. 79–84) is reported at 144 F. (2d) 375.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 1, 1944 (R. 84). The petition for rehearing was denied on August 28, 1944 (R. 84). The petition for a writ of certio-

rari was filed on September 30, 1944, and was granted on November 13, 1944 (R. 85). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a decree of a state court, ordering foreclosure of a mortgage executed by an Osage Indian and entered in a proceeding to which the United States was not a party, is a bar to this suit by the United States to have the mortgage declared invalid and title to the land quieted in the Indian.

2. Whether a mortgage on land inherited by an Osage allottee, who had a certificate of competency, from an Osage allottee to whom no certificate of competency had ever been issued, is invalid under the second sentence of Section 7 of the Act of April 18, 1912, because executed prior to the probate court's adjudication of heirship and issuance of an order distributing the estate to the heir.

3. Whether, the mortgagor being an Osage allottee of one-half or more Indian blood and the mortgage not having been approved by the Secretary of the Interior, the mortgage is invalid under Section 3 of the Act of February 27, 1925.

STATUTES INVOLVED

Sections 3, 6 and 7 of the Act of April 18, 1912, 37 Stat. 86, and Section 3 of the Act of February

27, 1925, 43 Stat. 1008, are set forth in the Appendix, *infra*, pp. 22–25.

STATEMENT

Mamie Fletcher Pitts, a full-blood Osage allottee, to whom no certificate of competency had been issued, died May 24, 1937, seized of land which had been allotted to her as a member of the Osage Tribe of Indians (R. 52). In proceedings for the probate of her estate duly instituted in the County Court of Osage County, Oklahoma, George Pitts, her husband, also a full-blood Osage allottee, was appointed administrator of her estate (R. 53). Pending conclusion of the administration proceedings the Osage Indian Agency looked after the lands under agricultural leases executed by Pitts as administrator (R. 53). On July 12, 1937, Pitts mortgaged the land involved to Fred G. Drummond as security for the payment of a note for $2,500.00, the mortgage being made without the approval of the Secretary of the Interior (R. 54). On June 24, 1938, the Secretary of the Interior revoked a certificate of competency which had been issued to George Pitts on July 11, 1910 (R. 53). On September 9, 1938, the County Court of Osage County entered its order adjudging George Pitts to be the sole heir of Mamie Pitts and directing the distribution of her estate to him (R. 53).

On October 24, 1939, Fred G. Drummond instituted an action against George Pitts in the Dis-

trict Court of Osage County to recover judgment on the note and for foreclosure of the mortgage. On February 9, 1940, a judgment foreclosing the mortgage was entered in that court in favor of Drummond. On May 6, 1941, the judgment was affirmed by the Supreme Court of Oklahoma. *Pitts* v. *Drummond,* 189 Okla. 574. On March 2, 1942, a petition for a writ of certiorari was denied by the Supreme Court of the United States. 315 U. S. 814. In that litigation, George Pitts was represented by a private attorney whose employment was approved by the Secretary of the Interior. The appeal to the Supreme Court of Oklahoma, the necessary supersedeas bond, and the petition for certiorari to the Supreme Court of the United States were authorized and approved by the Secretary who likewise authorized and approved the payment of the expenses of the litigation from the funds of George Pitts held by the Osage Indian Agency. The United States was not a party to this litigation, nor was counsel for the Indian authorized to appear for or represent the United States (R. 54–55).

On April 29, 1942, the United States brought this action on its own behalf and on behalf of George Pitts to cancel the mortgage and to quiet his title to the land involved (R. 1–9). On September 4, 1943, the District Court entered judgment in favor of Fred G. Drummond (R. 57). On August 1, 1944, the Circuit Court of Appeals reversed the judgment (R. 84).

SUMMARY OF ARGUMENT

1. The state court judgment in the foreclosure proceedings is not a bar to this suit. The United States was not a party to the foreclosure proceedings nor was it represented in any way. The approval and authorization by the Secretary of the Interior of the various steps in the state court litigation were sought by counsel chosen by Pitts and were granted (R. 54–55) only to permit payment of fees and expenses out of George Pitts' restricted funds in the hands of the Osage Agency.

2. The Circuit Court of Appeals correctly construed the second sentence of Section 7 of the Act of April 18, 1912, as rendering invalid a mortgage on lands inherited from a deceased Osage allottee, made by an Osage heir possessing a certificate of competency prior to the order of the probate court determining heirs and distributing the estate of the deceased allottee. That sentence makes no exception of Osage heirs who have certificates of competency and who alone are in need of its protection. Although it is true that Section 6 of the same Act permits such Indians to alienate their inherited lands, Section 7 protects the lands against liability for debts incurred before the issuance of certificates of competency or prior to the time when the lands are "turned over" to the heirs. The second sentence of Section 7 applies to the restricted lands of deceased Osage allottees. It would be irrational to suppose that Congress

intended to protect heirs with regard to the unrestricted lands but not with regard to the restricted lands. Restricted lands, although not coming under the control of the county court as assets for the payment of debts of the decedent, are the subject of determinations of heirship and orders of distribution. The title to land does not vest finally and irrevocably in the heir holding a certificate of competency until such an order is made. At that point the property is "turned over" to such heir within the meaning of the statute.

3. This construction of Section 7 of the Act of 1912 disposes of the case. In any event, Section 3 of the Act of February 27, 1925 provides that lands inherited by Osage Indians "of one-half or more Indian blood or who do not have certificates of competency" shall be inalienable except with the approval of the Secretary of the Interior. The mortgage is invalid if this provision is applicable to Osage Indians of one-half or more Indian blood who have certificates of competency. By its terms the statute applies. Although this construction causes Section 3 to continue the restrictions on the lands inherited by George Pitts from his wife, a restricted Osage, and thus causes Section 6 of the Act of April 18, 1912, *supra,* to be, in part, inoperative, that Section continues to apply to Indians of less than one-half Indian blood who have certificates of competency. In view of the clear wording of Section 3, the legis-

lative history, which refers to the statute as intended for the protection of incompetent Indians, should not be regarded as controlling.

ARGUMENT

I

THE STATE FORECLOSURE PROCEEDING IS NOT A BAR TO THIS SUIT

Both courts below properly rejected petitioner's contention (Br. in support of petition, 40–45) that the state court judgment is a bar to this suit (R. 55, 79). Judgments in proceedings to which the United States is not a party do not preclude it from suing to enforce restrictions on Indian lands. *Bowling* v. *United States,* 233 U. S. 528, 534–535; *Privett* v. *United States,* 256 U. S. 201, 203; *Sunderland* v. *United States,* 266 U. S. 226, 232; *Logan* v. *United States,* 58 F. (2d) 697 (C. C. A. 10); cf. *United States* v. *Hellard,* 322 U. S. 363. Contrary to petitioner's view, validity as against the United States does not attach to the state judgment here involved merely because the Secretary of the Interior authorized Pitts' employment of counsel and the various steps in the litigation (R. 54–55). His approval and authorization were sought by counsel chosen by Pitts and were granted only to permit payment of fees and expenses out of Pitts' restricted funds. See Section 6 of the Act of February 27, 1925, c. 359, 43 Stat., 1008, 1001. Except

that Pitts might have been financially unable to defend the suit but for the Secretary's approval and authorization, the control and conduct of the state litigation rested entirely with Pitts. The United States did not participate in the litigation or attempt in any way to aid Pitts in his defense. Since this case in fact presents no question of United States' aid to Pitts in conducting the state litigation, the doctrine of *Heckman* v. *United States*, 224 U. S. 413, 446, and *United States* v. *Candelaria*, 271 U. S. 432, 444, upon which petitioner relies (Br. in support of petition, 42–44), is not involved.[1]

II

THE MORTGAGE INVOLVED IS INVALID UNDER THE SECOND SENTENCE OF SECTION 7 OF THE ACT OF APRIL 18, 1912, 37 STAT. 86

The provision in question reads as follows:[2]

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[1] The purpose of petitioner's reference (Br. in support of petition, 12–13) to Section 4 of the Act of February 27, 1925, 43 Stat. 1008, 1010, and *United States* v. *Sands*, 94 F. (2d) 156 (C. C. A. 10), is far from clear. If that Act imposes any obligation on the Secretary of the Interior, under the circumstances of this case, to pay George Pitts' "just indebtedness * * * out of the income of such member, in addition to the quarterly income hereinbefore provided for," that obligation has no relation to the ruling of the court below that the mortgage foreclosed by petitioner was invalid. We are informed, moreover, that there is no income of George Pitts from which a payment directed by Section 4 could be made.

[2] The full text of Section 7 appears in the Appendix, *infra*, pp. 24–25.

> That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs * * *.

The Circuit Court of Appeals construed the provision as applicable to an Osage heir who has a certificate of competency; and it construed the words "turned over" as having reference to the action of the probate court in determining heirship and distributing the estate. The Supreme Court of Oklahoma held in the previous litigation referred to *supra,* pp. 3–4, that this sentence did not make the mortgage invalid. Its view was that the provision is not applicable (1) to an Osage heir who has a certificate of competency, or (2) to restricted lands of deceased Osage allottees. *Pitts* v. *Drummond,* 189 Okla. 574, certiorari denied, 315 U. S. 814. Its view was that Osage heirs who have certificates of competency are within a larger class of heirs, including also any who are not members of the Osage Tribe, the freedom of whose inherited lands from restrictions by virtue of Section 6 of the 1912 Act precludes the applicability of the exemption in question here. The relevant provision of that Section is:[3]

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[3] The full text of Section 6 is set forth in the Appendix, *infra,* pp. 23–24.

> When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.[4]

The Oklahoma court also regarded the provision of Section 7 as inapplicable to restricted lands of deceased Osage allottees because such lands are not assets in the hands of an administrator for the payment of debts; are not subject to his control; and, hence, are not "turned over" to the heirs by anyone. In sustaining the validity of the mortgage, the District Court in the present proceeding rejected the first ground of the decision in *Pitts* v. *Drummond, supra,* but adopted the second (R. 55–56). Petitioner relies on both grounds

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[4] Under this provision, the heirs specified are free to alienate lands inherited from deceased allottees. *Kenny* v. *Miles*, 250 U. S. 58, 63; *La Motte* v. *United States*, 254 U. S. 570, 580–581; Opinion of Preston C. West, Assistant Attorney General, dated March 23, 1914 (copies filed in the office of the Clerk).

In holding, in view of Section 6 of the 1912 Act, that the second sentence of Section 7 of that Act was inapplicable to Osage heirs who have certificates of competency, the Supreme Court of Oklahoma relied on *United States* v. *Mullendore*, 30 F. Supp. 13 (N. D. Okla.). That was a case in which it was held that the second sentence of Section 7 of the 1912 Act does not apply to non-Osage heirs because the 1912 Act as a whole discloses "a purpose to protect Osage allottees and their Osage Indian heirs" but "no policy for the protection of non-members of the tribe." 30 F. Supp. at p. 15. Cf. *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432. In its opinion, however, the court expressed the view that the second sentence of Section 7 of the 1912 Act has no application to the classes of heirs dealt with in Section 6 of that Act.

of that decision (Pet. & Br. in support of petition 15–40).

The Circuit Court of Appeals, we think, decided the question correctly. Under the Osage Allotment Act of 1906, a certificate of competency had but limited effect. It removed restrictions from the surplus allotment of the member only, Sec. 2, Seventh, of the Act of June 28, 1906 (34 Stat. 539, 542), leaving the homestead and such restricted lands as the member might inherit subject to the existing restrictions against alienation. We submit that Section 7 is merely another instance in which Congress sought to protect an Indian even though he held a certificate of competency. It is in no way inconsistent with Section 6 of the same (1912) Act.

The protection extended by Section 7 embraces members of the tribe having certificates of competency. The first sentence of that section protects all lands and funds from being taken in satisfaction of any debt, obligation, or claim incurred during the restricted period, i. e., prior to removal of restrictions or the issuance of a certificate of competency. The first clause of the first sentence of Section 7 operates on allotted lands only while the second clause of that sentence embraces all lands and funds of tribal members without qualification. The two clauses of the first sentence thus protect all lands and funds, including lands and funds acquired by inheritance, from indebtedness incurred by tribal members be-

fore the issuance of a certificate of competency or the removal of restrictions. Under this view, full protection is given by the first sentence of Section 7 to all lands and funds of tribal members not having certificates of competency when the debt was incurred whether the lands and funds accrue to the members in their own right as members of the tribe or by inheritance from deceased members. Accordingly, no effect can be given to the second sentence of Section 7 unless it be held to apply to the inherited lands and funds of members having certificates of competency and to prevent the taking of such lands and funds to secure "the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs", for the provision is unnecessary as regards restricted Indians who receive the protection of other provisions of law. It is the purpose of the second sentence to secure the property intact to the heirs as of the time it is "turned over."[5]

It is equally evident that restricted lands of deceased Osage allottees fall within the second sentence of Section 7 of the 1912 Act. The statute does not exclude restricted lands and, as

[5] It is obvious that the land and moneys are "turned over" when the estate is distributed after the identity of the heirs has been determined: Originally, the term "paid" was used but, as this expression was inappropriate when applied to land, the phrase "turned over" was substituted. See 48 Cong. Rec. 4252, 4253, 4263.

the Circuit Court of Appeals said (R. 80), it would be incongruous to conclude that Congress intended to protect unrestricted lands inherited from deceased Osage allottees but not restricted lands similarly inherited, often by the same heirs. The view which would exclude restricted lands is based upon federal statutes which cause the lands to be "free from any of * * * [the decedent's] obligations" and hence, it is said, free of the control of the administrator, which extends only to property available for the payment of debts. *Pitts* v. *Drummond, supra,* at p. 576. Upon the death of the allottee, the title to such lands passes immediately to the heirs. See the opinion of the court below, at R. 83. It does not follow, however, that the lands are not "turned over" by the court to the heir. We contend that they are and that they come within the statutory provision as fully as any other property.

Section 3 of the 1912 Act (Appendix, *infra,* pp. 22–23) provides that: "The property of deceased * * * allottees of the Osage Tribe * * * shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma." The local probate (i. e., county) courts are thereby invested with jurisdiction to determine heirship and to distribute the property of deceased Osage allottees. *Globe Indemnity Co.* v. *Bruce,* 81 F. (2d) 143 (C. C. A. 10); *Mudd* v. *Perry,* 25 F. (2d) 85 (C. C. A. 8); *In re Thompson's Estate,* 179 Okla. 240; opinion of the court below at R.

82. This jurisdiction is not dependent upon the existence of assets subject to payment of the decedent's debts. *Wolf* v. *Gills,* 96 Okla. 6; *In re Thompson's Estate,* 179 Okla. 240; *Hardridge* v. *Hardridge,* 168 Okla. 7. It is as complete in the case of the restricted property of deceased Osage allottees as in the case of the statutory homestead of a white decedent which is exempt from liability for the payment of debts. *Ward* v. *Cook,* 152 Okla. 234; *In re Thompson's Estate,* 179 Okla. 240. Therefore the title and right to possession which a particular heir acquires in restricted lands upon the death of the owner are not unqualified and may not, practically speaking, be immediate. Their final vesting is dependent upon the probate procedure, which eventuates in a determination of heirship and an order of distribution. *White House Lumber Company* v. *Howard,* 142 Okla. 163; *Oil Well Supply Co.* v. *Cremin,* 143 Okla. 57. While this postponement is more purposeful and vivid in a case, unlike that at bar, in which there is serious doubt as to the identity of the heir, consistency requires that the second sentence of Section 7 be given the same interpretation though there happens to be no such doubt in the circumstances of the particular case.

In the present case, the order of distribution did not occur until more than fifteen months after the decedent's death. In the circumstances, land inherited from a deceased Osage allottee may prop-

erly be said to be withheld from the heir while the probate court performs its function. During the period preceding the order of distribution the lands are protected with respect to liability for the debts of the heir. Since the mortgage here was given and the debt was incurred prior to the probate court's order of September 9, 1938, determining George Pitts to be Mamie Pitts' heir and directing distribution of the estate to him (R. 53), it follows that the mortgage is invalid and cannot be enforced against the lands involved. Petitioner contends (Br. in support of petition, 31) that all that "the sentence does is to postpone the time the creditor of an heir can reach the * * * property * * * until after the administrator is through" with it, leaving the previously-incurred debt and mortgage fully valid. This interpretation, however, is answered by the words of the sentence themselves, which not only provide that the property shall not be "taken and sold" for previously-incurred indebtedness but also that it shall not be "subject to" such indebtedness.

Our view as to the proper construction to be given to the second sentence of Section 7 derives support from the fact that when Congress enacted that Section it was attempting to deal with a serious situation, well known to it, which called for more adequate protection of the Osage Indians. Congress had long been cognizant of the fact that the Osage Indians as a group were inclined to incur indebtedness far in excess of

their income. The situation finally became so onerous that by the Act of March 3, 1901 (31 Stat. 1058, 1065), stringent limitations were placed on Indian traders extending credit to the Osages, and all indebtedness in excess of the limits therein provided was declared to be invalid. The propensity of the Osages toward extravagance was such a widespread trait common to the entire membership that the Secretary of the Interior was directed by the Act of April 21, 1904 (33 Stat. 189, 208), to apply certain tribal or community funds to the liquidation of the outstanding indebtedness of individual members of the tribe. The Indians' weakness, coupled with the reluctance of the merchants and traders to forego the financial advantages accruing to them from this weakness, had the inevitable result of keeping the Indians heavily in debt. Creditors became the real beneficiaries of the quarterly payments made to the Osages.[6] By the time of passage of the 1912 Act, it had become evident that some positive safeguard was needed in order to insure that each individual Indian would actually receive his share of the tribal estate, unburdened by any liability he may have incurred prior to the time such

[6] This unwholesome condition is recognized in the Congressional debates on the bill which became the Act of April 18, 1912 (48 Cong. Rec. 4253), wherein reference is made to the common practice of merchants assembling at the agency on the payment day and taking the Indians' quarterly payments in satisfaction of debts previously incurred.

property was turned over to him. There can be no doubt that this is the policy behind the enactment of Section 7 of the 1912 Act.

III

THE MORTGAGE IS INVALID UNDER SECTION 3 OF THE ACT OF FEBRUARY 27, 1925, 43 STAT. 1008

The Circuit Court of Appeals, since it held the mortgage invalid under Section 7 of the 1912 Act, found it unnecessary to rule upon the Government's further contention that the mortgage, not having been approved by the Secretary of the Interior (R. 54), was illegal under Section 3 of the Act of February 27, 1925, 43 Stat. 1008 (Appendix, *infra*. p. 25), which provides that:

> Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior * * *[7]

In *Pitts* v. *Drummond,* 189 Okla. 574, *supra,* the Supreme Court of Oklahoma held that Section 3 of the 1925 Act did not make the present mortgage

[7] This section was adopted in consequence of this Court's decision in *La Motte* v. *United States*, 254 U. S. 570, holding that a devise of restricted lands by an allottee, made with the approval of the Secretary of the Interior pursuant to Section 8 of the Act of April 18, 1912, 37 Stat. 86, operated as a conveyance of the lands free of restrictions.

invalid. Pitts had relied on *United States* v. *Johnson*, 29 F. Supp. 300 (N. D. Okla.) in which, in holding that Section 3 applied to an unallotted[8] Osage heir of less than one-half Indian blood who had no certificate of competency, the court said that Section 3 defines two overlapping classes of Indians, namely, those of one-half or more Indian blood, presumably without regard to whether they possess certificates of competency, and those of any degree of Indian blood who do not have such certificates. The contention was rejected that Section 3 applies only to Osages of one-half or more Indian blood who have no certificates of competency. The Supreme Court of Oklahoma, however, held that, since Pitts had a certificate of competency, he was excluded from Section 3, which it regarded as inapplicable to any persons who possess such certificates. 189 Okla. at p. 577. The District Court, concluding that Osage legisla-

[8] Section 5 of the Act of March 2, 1929, 45 Stat. 1478, in conjunction with Section 3 of the Act of February 27, 1925, *supra*, extended the requirement of approval of conveyances by the Secretary of the Interior to allotted lands inherited by unallotted, restricted Osage Indians of less than half-blood; for that Section imposed upon them the same restrictions as were previously applicable to allotted Indians of the same degree. Section 3 of the Act of March 3, 1921, 41 Stat. 1249, removed the restrictions from the allotted lands of Osage Indians of less than half-blood; but it did not operate to remove the restrictions from allotted lands subsequently inherited by such Indians from Indians of half-blood or more; for the previous restrictions remain with this land when inherited. *United States* v. *Johnson*, *supra*, at p. 303.

tion generally and the legislative report[9] on Section 3 negatived any Congressional intent to impose restrictions on lands inherited by Osage Indians who have certificates of competency, also held (R. 56–57) that Section 3 was inapplicable to such Indians.

We submit that Section 3 imposes restrictions on the lands inherited by Osage Indians who are of one-half or more Indian blood, such as Pitts, irrespective of whether they have certificates of competency. As the *Johnson* case, *supra,* recognizes, the words of the statute describe two classes of Indians. In the *Pitts* case the court advanced no reason for excluding an Indian who falls within the first of the two classes, but simply stated it was "clear" that the statute does not apply to those possessing certificates. This result is, however, far from clear on the basis of the words of the statute.

It is true that the statute, when given the construction for which we contend, operates to reimpose in part the restrictions which were removed by the provision of Section 6 of the Act of April 18, 1912, which has been discussed above in

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[9] The report states (H. Rep. No. 260, 68th Cong., 1st sess., p. 5):

Section 3: This section provides that lands devised by will, approved by the Secretary of the Interior, and lands belonging to incompetent allottees, shall not be alienated without the consent of the Secretary of the Interior, thus preventing an incompetent Indian from disposing of the land so received without adequate consideration.

its relation to Section 7 of the same Act. Section 6 remains operative, however, with respect to Indians of less than one-half Indian blood who have certificates of competency. Unless the two statutes are thus construed together, the language of the 1925 Act which aptly covers Indians of one-half or more Indian blood who have certificates of competency, would be left without meaning or explanation. Words so plain scarcely admit of resort to extraneous aids to their interpretation. Cf. *Osage County Motor Co.* v. *United States,* 33 F. (2d) 21, 22 (C. C. A. 8).

It is not unreasonable to hold that Section 3 of the 1925 Act applies to Osage Indians who have certificates of competency. As has already been pointed out, *supra,* p. 11, certificates of competency authorize the recipients to alienate their allotted surplus lands only and not their allotted homesteads, and hence do not confer complete capacity in any event. Act of June 28, 1906, Sec. 2, Seventh, 34 Stat. 539, 542. A certificate of competency, moreover, did not free the recipient to alienate inherited allotted land. See fn. 8, p. 18, *supra.* Congress in Section 6 of the 1912 Act did confer such freedom; but that freedom, as we contend, was again withdrawn by Section 3 of the 1925 Act. There is ample legislative precedent for such an enactment. See *Brader* v. *James,* 246 U. S. 88; *United States* v. *Jackson,* 280 U. S. 183.

Accordingly, it is submitted that Section 3 of the 1925 Act does apply to Osage Indians of one-half Indian blood or more who have certificates of competency and that, since the mortgage in question was executed without the approval of the Secretary of the Interior as required by that Section, the mortgage is invalid.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1945.

APPENDIX

Sections 3, 6, and 7 of the Act of April 18, 1912, 37 Stat. 86, are as follows:

SEC. 3. That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage Agency or the Secretary of

the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the county court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: *Provided,* That no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents: *Provided further,* That no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior.

SEC. 6. That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided,* That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the

matter of said partition, and partition of said lands shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees.

SEC. 7. That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall

be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: *Provided, however,* That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid upon order of the county court of Osage County, State of Oklahoma: *Provided further,* That nothing herein shall be construed so as to exempt any such property from liability for taxes.

Section 3 of the Act of February 27, 1925, 43 Stat. 1008, reads as follows:

SEC. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.

U. S. GOVERNMENT PRINTING OFFICE: 1945

SUPREME COURT OF THE UNITED STATES.

No. 520.—October Term, 1944.

Fred G. Drummond, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 5, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Mamie Fletcher Pitts, a full-blood Osage Indian, died on May 24, 1937, leaving land allotted to her as a member of her tribe. Her husband, George Pitts, also a full-blood Osage, was appointed administrator of her estate in appropriate proceedings in an Oklahoma court. His certificate of competency which had been granted him in 1910, § 2, Seventh, Act of June 28, 1906, 34 Stat. 539, 542, was revoked by the Secretary of the Interior on June 24, 1938. On September 9, 1938, he was adjudged to be the sole heir by the Oklahoma court, which entered an order directing distribution of Mamie's estate to him. Prior to that order, however, on July 12, 1937, Pitts had executed a mortgage of his wife's land to Drummond, the petitioner, to secure a contemporaneous promissory note. It is the validity of this mortgage, under the relevant Indian legislation, which is in controversy.

Petitioner in 1939 instituted a suit against Pitts in the state court to recover judgment on the note and to foreclose the mortgage. In that litigation Pitts, asserting the invalidity of the mortgage, was represented by a private attorney. Foreclosure was decreed, and this was upheld in the Supreme Court of Oklahoma. *Pitts* v. *Drummond*, 189 Okla. 574.[1] Thereafter, the United States brought the present action in its own right and on behalf of Pitts to cancel the mortgage and to quiet title. The petitioner succeeded in the District Court, but the judgment was reversed by the Circuit Court of Appeals for the Tenth Circuit. 144 F. 2d 375. The conflict in result between the decision below and the earlier decision of the Oklahoma Supreme Court led us to grant certiorari, 323 U. S. —.

[1] To complete the history of this litigation we note that certiorari was denied, 315 U. S. 814.

A claim of *res judicata* meets us at the outset. Petitioner contends that the adjudication in *Pitts* v. *Drummond, supra,* binds the United States. To escape from the rule that the United States is not precluded from enforcing restrictions on Indian lands by any prior judgment in proceedings to which it was a stranger, *Bowling* v. *United States,* 233 U. S. 528, 534-535; *United States* v. *Hellard,* 322 U. S. 363, 366; and see Cohen, Handbook of Federal Indian Law (1941) 369, petitioner relies on the authorization by the Secretary of the Interior of the employment of Pitts' attorney and the approval of the latter's fee. If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. Compare *United States* v. *Candelaria,* 271 U. S. 432; 16 F. 2d 559, with *Logan* v. *United States,* 58 F. 2d 697. But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy. This is not to be inferred merely because the Secretary of the Interior enables an incompetent Indian to protect his interests.

This brings us to the merits of the controversy—the validity of the mortgage given by Pitts as security for a loan before the Oklahoma court adjudged him to be his wife's heir. The decision turns on the construction of the Act of April 18, 1912, and more particularly on §§ 6 and 7, 37 Stat. 86. Section 6, so far as here relevant, removes restrictions on alienation of land inherited by heirs who have certificates of competency or who are not tribal members. After providing that allotment lands or funds shall not be liable or subjected to any claim arising prior to the granting of a certificate of competency, § 7 continues: "That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs". These provisions have the characteristic infelicity of draftsmanship in Indian legislation which is such a fertile breeder of wasteful litigation. But the language, together with the light shed by the revelant Senate Report, makes the meaning clear enough.

Since Pitts incurred the debt to petitioner before the probate court adjudged him to be the heir, the transaction comes clearly within the invalidation of § 7. Petitioner contends that

even though Pitts incurred the debt to him before the probate court decreed heirship, power to mortgage the land is authorized by § 6 which removed restrictions on land inherited by an heir having a certificate of competency which Pitts did have at the time of the mortgage transaction. But this result would render meaningless the sentence we have quoted from § 7 and disregard the purpose of § 7 as authoritatively stated in the Senate Report proposing the legislation. The object of § 7, according to the Senate Committee, was that "no land or money inherited shall be subject to any prior indebtedness". S. Rep. No. 127, 62d Cong., 1st Sess., p. 2. Since the sentence dealing with the invalidation is preceded by one which gives full protection against debts incurred prior to the issuance of a certificate of competency, the second sentence would have no function whatever unless it be construed to render unenforceable any claims against inherited property arising at any time before it was "turned over" to an heir. And this brings us to the final argument.

It is urged that § 7 is inapplicable because Mamie's land was never "turned over" to Pitts but came to him automatically on the death of his wife. The basis of this argument is that, inasmuch as Mamie was an incompetent, her estate was not subject to any claims against her and therefore necessarily would come to her heir unburdened. But § 7, in speaking of turning over lands to an heir, was surely not concerned with the mysteries of seisin. It dealt with the practicalities of ascertaining ownership through inheritance by appropriate proceedings. To that end § 3 of the Act of 1912 conferred probate jurisdiction upon the state courts. *In re Thompson's Estate*, 179 Okla. 240. The statute, that is, had in mind the judicial process of ascertaining the heir and the completion of that process by court action whereby the land was "turned over" to the ascertained heir. And so here, when the Oklahoma court decreed that Pitts was Mamie's heir, the land in the sensible use of the phrase "turned over" was turned over to Pitts.

Other arguments have not been overlooked but they need not be separately considered.

Affirmed.

Mr. Justice JACKSON dissents.